# for The Defense

The Training Newsletter for the Maricopa County Public Defender's Office

Volume 3, Issue 11 -- November 1993

Dean W. Trebesch, Maricopa County Public Defender


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## Are Arizona's Drug Laws Race Neutral?

**By Christopher Johns**

What if statistical evidence nationally showed that African-Americans overwhelmingly use crack cocaine and that whites primarily use powder cocaine? What if, despite the lack of medical or scientific evidence making a major distinction between crack and powder cocaine, the Arizona legislature passed a law requiring mandatory prison for a lesser amount of "crack" cocaine than "powder" cocaine? And, what if the amount of powder cocaine that requires a mandatory prison sentence was almost 7 times the amount of crack. Are you suspicious yet?

*New Drug Law Effective January 1*

That's precisely what's about to happen in Arizona. Under a change to the criminal code enacted in 1993 and effective on January 1, 1994, the legislature made substantial amendments to Arizona's criminal code. Before the changes, Arizona's drug laws punished the person who sold just a few dollars of narcotics as harshly as the person who sold a small fortune's worth.

New "threshold" amounts now require a mandatory prison sentence only if the drug quantity sold, possessed for sale, or administered is over a certain amount. The point is to make the penalties more fair by punishing drug dealers, and allowing courts the discretion to place low-level drug user/dealers on probation.

*Little Consideration for Reality*

To anyone vaguely familiar with street drug use, however, the new "threshold amounts" have a disproportionately punitive effect on blacks. Considering that the Arizona Department of Corrections houses an African-American population of 17.2 percent of its inmates--when the state has only a 2.8 percent black population, there is fear by some that laws are not enforced race neutrally to begin with.

*Crack Used Primarily by Blacks*

"Crack" is the "street" term for cocaine base. It is easily made by heating cocaine hydrochloride (powdered cocaine) and baking soda on a stove top. According to the U.S. Bureau of Justice Statistics, evidence shows that crack cocaine is used almost exclusively by African-Americans. Caucasians primarily use powder cocaine. Crack cocaine is smoked in a pipe--while powder cocaine is either "snorted" or injected with a hypodermic needle.

The distinction between the forms of cocaine has become increasingly embarrassing for federal prosecutors. According to a 1992 U.S. Sentencing Commission report, of all the defendants sentenced for federal crack cocaine offenses in 1992, 92.6 percent were black. One hundred percent of those arrested for simple possession of crack were black. The disparity has led to an outcry from the African-American community and prison activist groups over the unwarranted disparity in federal sentencing between crack and powder cocaine users. Under federal law, five grams of crack carries the same penalty as 500 grams of powder cocaine.

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*Drug Czar Condemns Disparity*

Even Lee Brown, President Clinton's drug czar directing the Office for National Drug Policy Control, has condemned the federal sentencing guidelines differentiating between powder and crack cocaine. According to Brown, "Disparity does exist. For five grams of crack cocaine, you get a mandatory minimum time in prison. For the same amount of powder cocaine, you get probation. The result is that African-Americans are ones using crack, and they are going to prison for possessing small amounts, while whites are not for possessing the same small amount of powder cocaine."

**Even Lee Brown, President Clinton's drug czar directing the Office for National Drug Policy Control, has condemned the federal sentencing guidelines differentiating between powder and crack cocaine.**

Despite the raging national debate over the subject, Arizona legislature followed the federal model and made a distinction between the threshold amounts for crack and powder cocaine.

*Threshold Amounts*

Under the new Arizona drug laws taking effect in January, the legislature created what are called "threshold amounts" of drugs. For example, if you sell or possess less than one gram of heroin as a first-time offender, you are still eligible to receive probation by the trial court instead of mandatory prison. Under old drug laws, if you sold some heroin, no matter how small or large the amount, an offender could receive the same mandatory prison term.

*Prison Overcrowding Behind Changes*

The changes make sense, particularly with Arizona's prison population of over 17,500 becoming an annual budget buster. Nearly one-fourth of those in Arizona prisons are there for drug offenses. Many policy makers are quickly realizing that Arizona's prison space needs to be reserved for violent criminals and not non-violent drug offenders. In fact, one of the policy recommendations from Arizona's November Town Hall on the subject of violence is to consider treating drug abuse as a public health problem, and not just a "criminal justice" issue.

**All this makes sense, until you get to crack cocaine. The threshold amount for "crack" is 750 milligrams--in other words, three-quarters of one gram. The threshold amount for powder cocaine, however, is 9 grams--more than ten times the threshold for crack.**

The thresholds were created, for example in the case of heroin, because it's thought that the one gram amount is consistent with low-level dealer/users. Selling more than one gram is thought to be consistent with not merely using, but dealing on a larger scale.

All this makes sense, until you get to crack cocaine. The threshold amount for "crack" is 750 milligrams--in other words, three-quarters of one gram. The threshold for powder cocaine, however, is 9 grams--more than ten times the threshold for crack.

*No Scientific Distinction*

The distinction that was made between powder and crack cocaine is based on anecdotal observations by prosecutors and police officers testifying before the Arizona legislature. According to one participant in the criminal code changes, there was no particularly scientific debate on the subject. At least federally, the claim has been that crack cocaine is more addictive and that it is associated with more violence.

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**FOR THE DEFENSE**

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Scientific evidence, however, has failed to prove any of this. Powder cocaine is easily injected or "shot-up" intravenously in a syringe. The effect on the body of liquefied cocaine is similar to that of smoking crack cocaine.

According to Dr. George Schwartz, an expert in emergency medicine who provided an affidavit for one offender challenging similar federal sentencing guidelines, there is no objective scientific data to support the conclusion that crack is more addictive or dangerous than powder cocaine.

In fact, the opposite is probably true. For example, according to Dr. Schwartz, three times as many deaths are reported from snorting cocaine as opposed to crack use. And, injecting powder cocaine--which can't be done with crack--increases the threat of infections, particularly HIV and hepatitis. And, according to one expert, nine grams of 90-percent pure powder cocaine can be made into a little over eight grams of crack cocaine by simply removing the hydrochloride from powder cocaine with baking soda and water.

**At least one state supreme court has agreed with those noting the apparent discriminatory impact of punishing almost exclusively African-American offenders for possessing smaller amounts of crack.**

*Minnesota Court Strikes Law*

At least one state supreme court has agreed with those noting the apparent discriminatory impact of punishing almost exclusively African-American offenders for possessing smaller amounts of crack. In the 1991 case of *State v. Russell,* 477 N.W. 2d 886 (Minn. 1991), the Minnesota Supreme Court struck down its crack possession statute on equal protection of the law grounds. In Minnesota, possessing three or more grams of crack resulted in the same sentence that 10 or more grams of powder cocaine did.

**As presently written the new threshold quantity for crack is discriminatory. A substantial number of Arizona's African-Americans are going to be arrested and sent to prison for selling less cocaine in crack form than white offenders selling more than ten times as much powder cocaine. Defense lawyers who represent clients under the new "crack" statute should consider constructing a *State v. Russell* claim on state and federal constitutional grounds.**

*Statistical Evidence Used to Prove Claim*

The court was provided statistics that in 1988 in Minnesota 96.6 percent of the persons charged with crack possession were black. Of all persons charged with possession of powder cocaine, 79.6 percent were white. Striking down the statute providing for the penalties under the Minnesota constitution, the court found that the "distinction appears to be based on an arbitrary rather than a genuine and substantial distinction."

The court also noted that it is the use of cocaine that is important and not the form in which the drug is used. Saying, in comparison, that driving while intoxicated is equally illegal regardless of whether the offender ingested beer, wine or distilled spirits.

As presently written the new threshold quantity for crack is discriminatory. A substantial number of Arizona's African-Americans are going to be arrested and sent to prison for selling less cocaine in crack form than white offenders selling more than ten times as much powder cocaine. Defense lawyers who represent clients under the new "crack" statute should consider constructing a *State v. Russell* claim on state and federal constitutional grounds. In ruling the distinction in penalty between crack and powder cocaine unwarranted, the Minnesota Supreme Court stated that the "challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection."

*Class 4 Opens*

The new drug thresholds, however, are not the only instance where an argument can be made that Arizona's drug laws are discriminatory. For years the drug statutes have provided for a class 4 open for possession of dangerous drugs. No such equivalent exists for possession of narcotics such as heroin and cocaine.

While evidence is only anecdotal, the overwhelming number of offenders using dangerous drugs, such as methamphetamine, are white. "Meth" or "crank" is the drug of choice for, among others, bikers and truck drivers. Narcotics drugs tend to be used by a less narrow population group. Again, there is ample anecdotal evidence that "dangerous drugs" are in fact much more dangerous than narcotics. Even the process of making "meth" involves explosive chemicals. Nevertheless, the class 4 open remains an option for first-time offenders who are almost always white--as opposed to the first-time cocaine user who is more likely to be African-American or Hispanic. This disparity should be remedied by allowing class 4 open-ended offenses for possession of cocaine and heroin, instead of the narrow class of white offenders who invariably benefit from the class 4 open.

**While evidence is only anecdotal, the overwhelming number of offenders using dangerous drugs, such as methamphetamine, are white. "Meth" or "crank" is the drug of choice for, among others, bikers and truck drivers.**

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*Role of Defense*

There are probably other examples as well. For example, statistics from the TASC diversion program show that African-Americans participate in the program at a level far below their arrests rates. The question is why? As in the case of "crack," practitioners need to consider constitutionally attacking statutes and criminal justice policies that have a discriminatory impact on minority clients. Both the U.S. and Arizona constitutions should be employed for grounds. It is critical that racial bias be eliminated from the criminal justice system. Abolishing unjustified disparities in sentencing, treatment, and accessibility to programs is necessary. In reality, it is the criminal defense counsel who must take up the mantle, be creative, and invest in "statistical defenses" if necessary to show the bias that exists within the system. ^

## Criminal Depositions

**by Tom Klobas**

The witness just won't cooperate with you. Repeated appointments are ignored and your trial date is fast approaching. You know that you absolutely have to interview this person in order to be properly prepared for trial. The decision is made: a motion and order for deposition of the witness will be filed.

The term "deposition," as used by practitioners in our office, commonly describes nothing more than a compelled interview. It bears only a passing resemblance to the intricate ceremony used in civil proceedings. For that reason, attorneys who intend to use the standard office interview deposition at trial in lieu of the appearance of a witness may find themselves frustrated by a thicket of objections based upon a failure to heed the specific procedures spelled out for the formal deposition process.

**The term "deposition," as used by practitioners in our office, commonly describes nothing more than a compelled interview.**

The purpose of this article is not to give you a fail-safe step-by-step method for doing a completely acceptable deposition that will substitute for a witness's nonappearance at trial. For that, there is no alternative but to become thoroughly familiar with the rules of civil procedure, particularly Rule 30. Rather, it is to give you an appreciation of the differences between the process we refer to as a deposition and its more formal cousin.

Application of depositions to the discovery process is governed by statute, the rules of criminal procedure and the rules of civil procedure. As we shall see, the three do not all sing in perfect harmony.

The authority to use depositions as part of the criminal discovery process is found in Criminal Rule 15.3. A deposition is available only by court order based upon motion by "any party or a witness." Such orders are issued at the discretion of the court but cannot apply to defendants or victims.

Under Criminal Rule 15.3(a), there are three situations that justify a deposition:

(1) A substantial likelihood that a material witness will not be available at the time of trial,

(2) A witness "whose testimony is material to the case or necessary to prepare the defense or investigate the offense" but was not a witness at the preliminary hearing, will not cooperate in granting a personal interview, or

(3) A witness is incarcerated for failure to give "satisfactory security" that they will appear at a trial or hearing.

The rule goes on to state that the depositions "shall be taken in the manner provided in civil actions." Rule 15.3(b).

Depositions in criminal proceedings are also governed by A.R.S. § 13-4101 et seq. (in-state witnesses and § 13-4111 et seq. (out-of-state witnesses). For brevity, I will only cover the conditions involving in-state witnesses. Under A.R.S. § 13-4102, only two grounds exist for requesting an order to depose a material witness: the witness "is about to leave the state, or is so sick or infirm as to afford reasonable grounds to believe that he will be unable to attend the trial."

**This statutory limitation does not prevent our supreme court from approving witness testimony memorialized by tape recording, stenographic record by a court reporter, video tape, or qualified shorthand notes "so long as a properly certified transcript can be prepared for trial of the case."**

The companion statutes also spell out the manner in which the deposition is to be conducted and in some cases differs substantially from the civil rules alluded to in Criminal Rule 15.3. These differences may have increased in number due to the recent overhaul of the civil rules. As one example, A.R.S. § 13-4103 requires that the witness be served with the court order at least two days prior to the examination. Civil Rule 30(b) requires 10 days' notice to the witness. Of course, a civil deposition need not be obtained by court order.

Let us focus on the mechanics of the deposition itself. First, we'll consider the requirements under the statutes. A.R.S. § 13-4103(B) mandates that the court order directing the examination shall include the name of the officer before whom it is to be done. The officers competent to do so are a clerk of the court, a court reporter, a magistrate or a notary public. 13-4104(A) indicates that this officer will issue the subpoena to enforce attendance of the witness.

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The witness's testimony "shall be reduced to writing and authenticated in the same manner as testimony of a witness taken ... at preliminary examinations." A.R.S. § 13-4104(B). The officer then seals the deposition and transmits it to the clerk of the court where the action is pending. 13-4101(C). No alternative method is described. Perhaps this is a consequence of the fact that this series of statutes originated in territorial days and was last amended 15 years ago. This statutory limitation does not prevent our supreme court from approving witness testimony memorialized by tape recording, stenographic record by a court reporter, video tape, or qualified shorthand notes "so long as a properly certified transcript can be prepared for trial of the case." *State ex rel. Baumert v. Superior Court*, 651 P.2d 1196, 1199 (1982).

The most detailed description of the deposition process is in the many subparts of Rule 30 of the Civil Rules of Procedure. Deposition by telephone is even permitted. Rule 30(b)(7). The rule also sets time periods; a deposition is not to exceed four hours in length under normal circumstances (Rule 30(d)), and shall begin within 30 minutes of the time set regardless of whether the adversary is present (Rule 30(c)).

Importantly for our purposes here, Rule 30 sets forth the process of recordation and certification which must be adhered to if the written record is to be admissible at trial in lieu of a non-appearing witness. Rules 30(e) and 30(f) place a heavy burden upon the officer who administers the examination. That person not only must place the witness under oath, but is responsible for preparation of the written transcript which then is presented to the examined party for reading. Changes desired by the witness are entered with a statement by that person of the reasons for the change. The witness then has 30 days in which to sign the deposition; if not done, the officer must document the reason why it was not done. The completed record is then sealed and filed with the court. All notes, tapes, etc. taken or recorded by the officer are to be preserved and retained for a period of ten years.

The above description is only the briefest listing of the pitfalls and hurdles involved in complying with the civil rules governing the taking and preservation of deposition testimony. It should be readily apparent that these procedures are not meant to be followed in the normal deposition-taking engaged in by our attorneys. There is a fundamental difference in handling the testimony of an uncooperative but otherwise available witness and a witness you have every reason to believe will not be available for trial. Should you come upon the latter, you must engage the services of a court reporter who is familiar with the civil requirements of certification and preservation. To that end, you will be required to obtain advance approval of the use of funds for that purpose.

The vast majority of our depositions do not involve the non-available witness. Consequently, use of our notaries to administer the oath to the witness together with audio-taping of the interview itself should be sufficient to accomplish your goal as long as you are aware of the limits of its use.

**This small group of five employees perform one of the most useful and valuable functions in the office. Yet their availability and versatility are not known as widely as they should.**

## Initial Services Specialists: Vital to Excellent Representation

**by Tom Klobas**

You are a recently appointed client of the Public Defender's Office. Who are you going to meet first? If your case is "scratched", who may be the only person you will ever meet from this office?

You are an attorney in the office. You have a full calendar but you must get some vital information to an in-custody client. Who can you turn to? The answer to these questions will in all likelihood be an Initial Services Specialist. This small group of five employees perform one of the most useful and valuable functions in the office. Yet their availability and versatility are not known as widely as they should.

**For example, inmates injured while being arrested or booked can arrange to have their injuries photographed for use in their defense. On more than one occasion, persons who have been erroneously identified as being a fugitive have been released quickly through action initiated by an ISS.**

The Initial Services Specialist (ISS) is primarily known for the initial interviews given clients, both those in and out of custody, soon after this office is appointed to represent them. For this reason, they visit each jail location (except Avondale and Mesa) on a daily basis. Not only do they have clients fill out the initial interview form, but they also provide important information regarding this office's legal representation and the criminal justice process.

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They have reported situations that have enabled us to secure evidence which might otherwise have been lost. For example, inmates injured while being arrested or booked can arrange to have their injuries photographed for use in their defense. On more than one occasion, persons who have been erroneously identified as being a fugitive have been released quickly through action initiated by an ISS. And of course, innumerable attorneys have been assisted by having an opportunity to become familiar with a client before their first meeting through reading the initial interview form.

The five ISS's are Yolanda Carrier, Sylvia Gomez, Cindy Goodrow, Joklene Miller, and Norma Muñoz. Four of them speak fluent Spanish. Their value to us extends far beyond the initial interview of clients. Need to have a release motion questionnaire filled out by a client? Have an ISS do it. Need to have a short message delivered to a client? Send it via ISS. Want to give your client time to read a lengthy DR? Send it through an ISS who will collect it from the client and return it to you when he or she is done with it. Need a medical release signed? Guess who can do it.

One word of caution. While four of the ISS's speak Spanish, they are not certified to translate legal documents. So while they can translate messages, phone calls, and letters, they cannot do plea agreements or similar materials.

To obtain ISS visitation services, you must identify in-custody clients by name, jail location and either booking number or date of birth. Written materials are to be placed in the container in each group used for collecting material for jail delivery.

Because interviews are done daily on out-of-custody clients, at least one ISS is available by telephone throughout the day.

These dedicated employees, who formerly worked under the title of Pre-Trial Services, can be an effective way to manage your time as well as assisting you to maintain frequent communication with your clients.

## October Jury Trials

*September 20*

Brad Bransky and Vicki Lopez: Client charged with murder in the first degree, burglary in the first degree, and two counts of aggravated assault. Investigator B. Abernathy. Trial before Judge Cole ended October 7. Client found **not guilty**. Prosecutor Ditsworth.

*September 23*

David Anderson: Client charged with sexual assault and kidnapping. Investigator M. Breen. Trial before Judge Portley ended October 7. Client found **not guilty**. Prosecutor Evans.

*September 27*

Emmet Ronan: Client charged with nineteen counts of fraud. Investigator D. Moller. Trial before Judge Hall ended October 19. Client found guilty on seventeen counts, **not guilty** on one count, and one count dismissed. Prosecutor D. Mesh.

*September 28*

Joseph Stazzone: Client charged with three counts of sale of narcotic drugs (with priors). Trial before Judge Brown ended October 5. Client found guilty. Prosecutor V. Liles.

*September 29*

Nancy Johnson and Larry Grant: Client charged with aggravated DUI. Investigator M. Fusselman. Trial before Judge O'Melia ended October 5. Client found guilty. Prosecutor M. Ainley.

*September 30*

Thomas Kibler: Client charged with fraudulent schemes and artifices. Trial before Judge Schneider ended October 7. Client found guilty. Prosecutor H. Sucanek.

*October 4*

Robert Billar: Client charged with sale of narcotic drugs. Trial before Judge Dann ended October 6. Client found guilty. Prosecutor P. Sullivan.

Peg Green: Client charged with burglary in the second degree. Trial before Judge D'Angelo ended October 7. Client found guilty. Prosecutor Wakefield.

Richard Krecker: Client charged with armed robbery. Trial before Judge Hilliard ended October 7. Client found guilty. Prosecutor Tinsley.

*October 6*

Karen Noble: Client charged with promoting prison contraband (with two priors). Investigator H. Schwerin. Trial before Judge Martin ended October 6. Client found guilty on charge with one prior; dismissed second prior. Prosecutor Mann.

Kim O'Connor: Client charged with aggravated assault (dangerous and while on parole). Trial before Judge Anderson ended October 12 with a hung jury. Prosecutor Clarke.

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Pat Ramirez: Client charged with aggravated DUI. Investigator N. Jones. Trial before Judge Schwartz ended October 8. Client found guilty of misdemeanor DUI, judgment of acquittal on suspended license. Prosecutor Bartlett.

*October 7*

Roland Steinle: Client charged with seven counts of child molestation/sexual abuse. Trial before Judge Portley ended October 14. Client found guilty. Prosecutor Evans.

Leonard Whitfield and Robert Corbitt: Client charged with aggravated assault. Investigator D. Moller. Trial before Judge Roberts ended October 25 with a hung jury. Prosecutor J. Hicks.

*October 12*

James Cleary: Client charged with two counts of aggravated assault and one count of resisting arrest. Trial before Judge Hertzberg ended October 18. Client found **not guilty** on two counts of aggravated assault and guilty on resisting arrest. Prosecutor S. Lynch.

Gary Forsyth: Client charged with aggravated assault (dangerous). Trial before Judge D'Angelo ended in a mistrial October 13. Prosecutor V. Harris.

Valerie Shears: Client charged with child abuse (with priors). Trial before Judge Dann ended October 13. Client found guilty (priors were dismissed). Prosecutor D. Patton.

Nina Stenson: Client charged with one count of possession of narcotic drugs. Investigator R. Barwick. Trial before Judge Chornenky ended October 14. Client found **not guilty**. Prosecutor D. Terrell.

*October 13*

Frank Conti: Client charged with burglary and theft. Trial before Judge Sheldon ended October 14. Client found guilty. Prosecutor J. Martinez.

*October 14*

Christine Funckes: Client charged with two counts of fraudulent acts, one count of fraudulent schemes and artifices, and one count of theft. Trial before Judge Schwartz ended October 20. Client found **not guilty**. Attorney General M. Bolton.

Greg Parzych: Client charged with possession of marijuana for sale. Investigator D. Moller. Trial before Judge Barker ended October 21. Client found guilty. Prosecutor Flader.

*October 17*

Brad Bransky: Client charged with aggravated assault. Trial before Judge Brown ended October 22. Client found **not guilty**. Prosecutor Charnell.

*October 18*

Susan Corey: Client charged with armed robbery (while on parole). Investigator C. Yarbrough. Trial before Judge Bolton ended October 20. Client found **not guilty**. Prosecutor Clarke.

Jerry Hernandez: Client charged with aggravated DUI. Trial before Judge Kauffman ended October 20. Client fount guilty. Prosecutor Smyer.

Roland Steinle: Client charged with four counts of theft. Investigator G. Beatty. Trial before Judge Portley ended October 26. Client found guilty. Prosecutor McIlroy.

Slade Lawson: Client charged with possession of narcotic drugs. Investigator R. Thomas. Trial before Judge Sheldon ended October 20. Client found guilty. Prosecutor Mills.

*October 19*

Kevin Burns: Client charged with aggravated DUI. Trial before Judge Ryan ended October 21. Client found guilty. Prosecutor M. Ainley.

Bob Doyle and Dan Treon: Client charged with robbery. Investigator P. Kasieta. Trial before Judge Galati ended October 26. Client found guilty. Prosecutor Richards.

Peg Green: Client charged with theft. Trial before Judge Araneta ended October 28. Client found **not guilty**. Prosecutor A. Johnson.

*October 20*

Rickey Watson: Client charged with theft. Trial before Judge D'Leon ended October 21. Client found **not guilty**. Prosecutor D. Patton.

*October 21*

Larry Grant and Barbara Spencer: Client charged with attempted arson (dangerous) and misinforming a police officer. Trial before Judge Bolton ended October 27. Client found guilty on attempted arson and misinforming a police officer, (acquitted on dangerousness). Prosecutor Sherwin.

*October 26*

Gary Bevilacqua: Client charged with leaving the scene of an injury accident. Trial before Judge D'Angelo ended October 28. Client found guilty. Prosecutor J. Duarte.

*October 28*

Donna Elm: Client charged with aggravated assault (dangerous and with two priors). Investigator J. Castro. Trial before Judge Martin ended November 3. Client found **not guilty**. Prosecutor C. Macias.

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Editor's Note: The following is a correction for our October '93 Jury Trial column. The column should have noted:

September 14

Susan Corey: Client charged with aggravated assault (dangerous) and aggravated DUI. Investigator H. Brown. Trial before Judge Dann ended September 17. Client found guilty of DUI and disorderly conduct (misdemeanor). Prosecutor D. Palmer.

## ARIZONA ADVANCE REPORTS

*Volume 140*

*State v. Williams*,
140 Ariz. Adv. Rep 3 (S. Ct., 5/27/93)

Defendant seriously injured a 14-year-old boy by driving a truck, while drunk, into a car in which the boy was seated. Defendant was convicted of aggravated assault. Defendant received an enhanced sentence under A.R.S. § 13-604.01 (dangerous crimes against children). A.R.S. § 13-604.01 applies only when a defendant targets or directs his actions against a person who is under the age of 15, even if the defendant does not know the person's age. A.R.S. § 13-604.01 does not apply, however, when a defendant's actions create a risk to everyone around him but are not directed against a specific person, even if one under the age of 15 happens to be injured as a result. The spirit and purpose of A.R.S. § 13-604.01 are not well served by applying it to people who do not prey upon children but who accidentally injure children by their unfocused conduct.

*State v. Wills*,
140 Ariz. Adv. Rep. 7 (Div. 1, 6/13/93)

Defendant was charged with attempted murder. The state was unable to contact the victim and moved to dismiss without prejudice. The judge granted the motion, and indicated a motion to dismiss *with* prejudice would be granted in six months. The case was later dismissed *with* prejudice, and the state appealed. The trial court dismissed the case with prejudice because the dismissal was required by the interests of justice. Rule 16.5 requires a particularized finding on the record that a defendant will suffer some articulable harm if the dismissal is not granted. Mere recitation that dismissal is in the interests of justice, without more, is insufficient. [Represented on appeal by Stephen R. Collins, MCPD.]

*State v. Aussie*,
140 Ariz. Adv. Rep. 9 (Div. 1, 6/3/93)

Defendant and her husband were divorced in Navajo County. The husband, who lived in Navajo County, was awarded custody of the two children. Defendant lived in Mohave County. The children were exchanged for summer visitation approximately halfway between the parents' residences in Coconino County. The defendant failed to return the children after visitation and was charged with custodial interference in Navajo County. Citing improper venue, the trial court dismissed the indictment without prejudice.

Navajo County did have jurisdiction in this matter. The custodial interference statute, A.R.S. § 13-1302, includes as an element a prohibited "result", namely the deprivation of lawful custody. This makes our statute distinguishable from other statutes that require the commission of acts, rather than a "result", within the state to confer jurisdiction. Venue is proper in any county where the result of criminal conduct occurs. A.R.S. § 13-109(A). The indictment is reinstated.

*State v. Zimmer*,
140 Ariz. Adv. Rep. 14 (Div. 2, 5/18/93)

Defendant was convicted of six counts of dangerous crimes against children (child molestation and sexual abuse), but received mostly concurrent sentences. A.R.S. § 13-604.01(J) requires consecutive sentences for such convictions. The trial court concluded that, in this case, mandatory sentencing produced a result that was disproportionate to the offenses and, therefore, violated federal and state constitutional prohibitions against cruel and unusual punishment. *See, State v. Bartlett*, 164 Ariz. 229 (1990) and 171 Ariz. 302 (1992). Before a court is required constitutionally to conduct a proportionality review, a defendant must make an initial showing that the sentence is "grossly disproportionate" to the crime committed. Absent a defendant's threshold showing of disproportionality, a trial court may not refuse to apply sentencing statutes on either federal or state constitutional grounds. In this case, no showing of disproportionality has been or can be made. The sentences are modified from 17 to 51 years flat.

*State v. Reynolds*,
140 Ariz. Adv. Rep. 23 (Ct. App. Div. 1, 6/8/93)

Defendant entered into two separate plea agreements in two separate cause numbers and was sentenced individually on each. The judge ordered the defendant to pay an $8.00 time payment fee in each case. A.R.S. §12-116(A) requires each person to pay an $8.00 time payment fee if he or she cannot pay the fine in full on the date imposed. A court can assess an $8.00 time payment fee only on a per person, not a per felony conviction, basis. [Represented on appeal by Brent E. Graham, MCPD.]

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*State v. Hovey*,
140 Ariz. Adv. Rep. 24 (Div. 1, 6/8/93)

Defendant pled no contest to one count of Fraudulent Schemes and Artifices and five counts of Theft. He was placed on seven years' probation in order to pay $293,504.00 in restitution. The court originally ordered that he pay $500.00 per month, subject to modifications as his earnings indicated. The court annually reviewed his earnings and modified his monthly restitution payment accordingly. At the September 1991 review, the court ordered a monthly increase in payments from $1,370.00 to $3,000.00, despite defendant's uncontested testimony that he had no liquid assets, recently lost his job, and owed the IRS $40,000.00 on a tax lien. The Appellate Court did not have jurisdiction to consider the matter as a direct appeal, but treated it as a special action. In deciding the manner in which restitution is to be paid, the court shall consider the economic circumstances of the defendant. A.R.S. § 13-804(D).

The trial court did not properly consider defendant's economic circumstances and thereby abused its discretion. The order increasing the restitution payment is vacated.

*State v. Cook*,
140 Ariz. Adv. Rep. 25 (Div. 1, 6/10/93)

Defendant was originally accused by the Arizona Corporation Commission of selling unregistered securities, selling securities without a license, and securities fraud. Following a hearing, it was found that he had committed those violations. He was ordered to cease selling securities in Arizona, make restitution in the amount of $390,841.00, and pay an administrative penalty of $150,000.00. The defendant was subsequently indicted on criminal charges for the same conduct. Defendant moved to dismiss the indictment raising double jeopardy claims. The trial judge dismissed the indictment with prejudice.

Under the Double Jeopardy Clause, a defendant who has already been punished by criminal prosecution may not be subjected to additional civil punitive sanctions. *United States v. Halper*, 490 U.S. 435 (1989). The trial judge determined that the administrative penalty was punitive, not remedial. In making this determination, the court looked at the costs and attorneys' fees incurred by the State. There was also testimony of the commission's attorney that the fine imposed was intended to deter the defendant and others from committing similar acts. The trial judge did not abuse his discretion in finding that the penalty was punishment. For purposes of double jeopardy analysis, it makes no difference that the criminal action follows, rather than proceeds the civil proceeding. The dismissal with prejudice is affirmed. ^

## Book Reviews:

Bureau of Justice Statistics Source Book &
Highlights from 20 Years of Surveying Crime Victims

Our Appeals Division's library recently added two new books from the Bureau of Justice Statistics -- Source Book and Highlights from 20 Years of Surveying Crime Victims. The first book is a large volume containing charts and graphs covering statistics on such topics as

citizens' attitudes on crime issues,
law enforcement agencies,
drug and alcohol use,
arrests,
crimes,
sentencing,
prisons,
state and federal expenditures for corrections,
expenditures for judicial activities,
etc.

The smaller issue on Crime Victims noted on page 5, "Overall crime rates have been stable or declining in recent years; however, violent crime has increased in some groups."

Another interesting finding was that in general, citizens are more likely to become a victim of a violent crime that to be injured in a motor vehicle accident.

Both books contain listings of other Bureau of Justice Statistics reports that you may order on a variety of related topics. These Appeals' resources could prove invaluable in researching an issue. You will find them in the library on the 3rd Floor of the Luhrs Building. ^

## TRAINING AT A GLANCE

| DATE | TIME | TITLE | LOCATION |
|---|---|---|---|
| | | | |
| Wed., November 10 | 10:00 a.m. - 6:00 p.m. | *"Art of Advocacy/Act of Communication for Criminal Defense Attorneys"* | MCPD Training Facility |
| Wed., November 17 | 8:30 a.m. - 4:30 p.m. | *Criminal Code Revisions Telecast in conjunction with Arizona Supreme Court, et al.* | (To Be Announced) |
| Tues., November 30 | 1:30 p.m. - 3:30 p.m. | *"The Changing Criminal Code: A Support Staff Primer"* | MCPD Training Facility |
| Tues., December 07 | 9:00 a.m. - 11:30 a.m. (for all supervisors: attorney & support staff)<br><br>1:30 p.m. - 4:00 p.m. (for all non-supervisors: attorney and support staff) | *"Sexual Harassment"* | MCPD Training Facility |
| Fri., December 17 | 9:00 a.m. - 5:00 p.m. | *"Deciphering the New Criminal Code: A Defense Perspective"* | Board of Supervisors Aud. |
| Wed., January 26 | 9:30 a.m. - 11:00 a.m. | "Ergonomics in a Law Office" | MCPD Training Facility |
| | | | |

## Bulletin Board

Speakers Bureau

Terry Bublik, Richard Kaplan (CSC), Paul Lerner and Colleen McNally recently joined our Speakers Bureau. Our Bureau has grown to 36 members who are knowledgeable in a wide variety of legal topics, including the criminal justice system, the juvenile justice system, child protective services, and mental health. On November 15, Richard Kaplan spoke on the Juvenile Justice System to a Juvenile Justice Class at Scottsdale Community College.

Desperately Seeking Clothing...

Our Client Clothing Closet has become very popular. Unfortunately, many clothing items are missing. Please check your offices for clothing you have borrowed and have forgotten to return.

Our Closet needs donations of the following men's items: dress shirts (sizes 16, 17, and 18); shoes (sizes 8 - 10); dress pants (sizes 36 - 46 x 34); and dark or dress socks.

You will receive a receipt for your *tax-deductible* donation by notifying Amy Bagdol, 506-3061, of your contribution. Our thanks in advance for supporting this program.

FOR THE DEFENSE INDEX*

Beginning prison population Arizona Department of Corrections 1972: 1,475
Beginning prison population Arizona Department of Corrections 1993: 17,681
Actual prison capacity for 1993 Arizona Department of Corrections: 16,072
Percentage of Arizona Department of Corrections inmates who claim to have a graduate degree: 0.01%
Percentage of Arizona Department of Corrections inmates who claim to have no formal education at all: 1.9%
Average number of prisoners per month added to Arizona Department of Corrections population: 97.0
Number of beds at Arizona State Prison Complex in Florence: 2,387
Number of inmates at Arizona State Prison Complex in Florence: 2,513
Number of male inmate escapees returned to Arizona Department of Corrections for Fiscal 1993: 18
Number of female escapees returned to Arizona Department of Corrections for Fiscal 1993: 4
Percentage of Arizona Department of Corrections inmates in prison under NCIC offense classification for homicide: 8.1%
Percentage of Arizona Department of Corrections inmates in prison under NCIC offense classification for drugs: 20.6%
Percentage of Arizona Department of Corrections inmates in prison under NCIC offense classification for non-violent/non-sex crimes: 60.4%
Percentage of Caucasian inmates in Arizona Department of Corrections as of June 30, 1993: 47.1%
Percentage of Caucasians in Arizona: 71.8%
Percentage of African-American inmates in Arizona Department of Corrections as of June 30, 1993: 17.2%
African-American population of Arizona in 1993: 2.8%
Percentage of Mexican American inmates in Arizona Department of Corrections as of June 30, 1993: 22.6%
Hispanic population of Arizona in 1993: 18.8%
Percentage of Mexican Nationals inmates in Arizona Department of Corrections as of June 30, 1993: 8.6%
Number of inmates as of June 30, 1993 in the Arizona Department of Corrections that are over age 60: 305
Number of inmates committed to Arizona Department of Corrections from Greenlee County as of June 30, 1993 in the total population: 10
Number of inmates committed to Arizona Department of Corrections from Maricopa County as June 30, 1993 in the total population: 9,453
Number of people injured as a result of violent crime from 1973 to 1991: 36.6 million
Average dollar amount loss per crime in 1991: $550.00
Number of households in the United States victimized by one or more crimes annually: 1 in 4
Percent of U.S. households that had at least one member age 12 or older who was a crime victim: 5
Number of jurisdictions in the U.S. that have a average daily jail population of least 100 inmates: 503
Number of juveniles estimated to be housed in adult jails on June 30, 1992: 2,804
Percentage of males that make up jail population: 91%
Average daily population of all jails on June 30, 1992: 441,889
Number of jail inmates who died of natural causes in custody nationally in 1992: 170
Number of jail inmates who died of AIDS in custody nationally in 1992: 107
Number of jail inmates who were killed by another while in custody in 1992: 14
Total full and part-time employees in police and sheriffs' departments: 841,099

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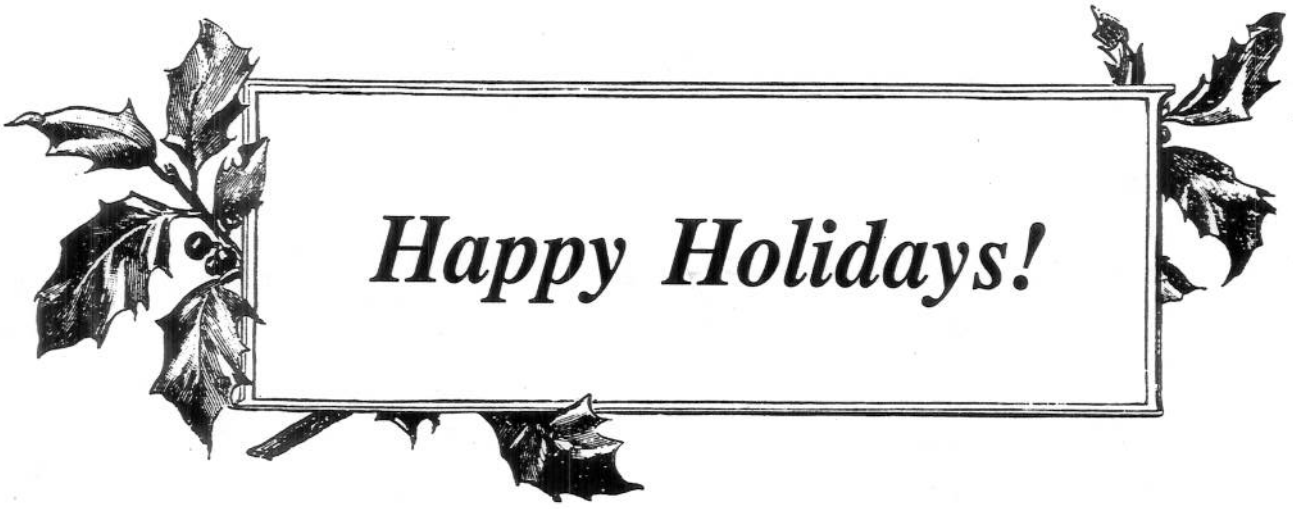
**Sources: Highlights from 20 Years of Surveying Crime Victims, Bureau of Justice Statistics; Crime and the Nations's Households, 1992, Bureau of Justice Statistics; Jail Inmates 1992, Bureau of Justice Statistics; Census of State and Local Law Enforcement Agencies, 1992, Bureau of Justice Statistics; Collection of Facts About Arizona Corrections Prepared for The Arizona Town Hall on Violence. For the Defense Index is compiled by the Editor.*


Happy Holidays!